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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: NOV 04 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

[consolidated with [redacted]]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). The petition is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a mental health clinic. On December 11, 2006 it filed a petition, Form I-140, to permanently employ the beneficiary in the United States as a (bilingual) psychotherapist and to classify him as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition was accompanied by a Form ETA 750, Application for Alien Employment Certification, which was filed with the Department of Labor (DOL) on May 3, 2002, and certified by the DOL on January 31, 2006.

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. *See* 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The Director denied the petition initially on the ground that the Form ETA 750, as certified by the DOL, did not require either a master's degree or a bachelor's degree followed by at least five years of progressive experience in the specialty to qualify for the proffered position. The director also noted that the labor certification appeared to have been altered with respect to the number of years of college required for the position, which cast doubt on the evidence of record in general.

The petitioner filed a motion to reopen and reconsider. The Director granted the motion, before affirming his denial of the petition. The grounds for denial were threefold: (1) the labor certification (Form ETA 750) approved by the DOL did not support the requested classification of the proffered position on the immigrant visa petition (Form I-140) as an advanced degree professional, (2) the beneficiary did not meet the educational and experience qualifications for the position as of the date the labor certification application was received by the DOL, and (3) the Form ETA 750 bore evidence of having been altered without the approval of the DOL.

The petitioner filed a second motion to reopen and reconsider, which was dismissed by the Director. The petitioner then filed an appeal, which is now before the AAO.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On May 20, 2011, the AAO issued a Request for Evidence and Notice of Derogatory Information. The AAO advised the petitioner that additional or updated evidence was needed – regarding the beneficiary's educational credentials and work experience and the petitioner's ability to pay the proffered wage – before a decision could be rendered on the appeal. The petitioner responded on July 18, 2011, by submitting some, but not all, of the requested evidence.

On August 10, 2011, the AAO issued a second Request for Evidence (RFE). Citing records of U.S. Citizenship and Immigration Services (USCIS) that the petitioner had filed more than 30 other visa petitions for alien workers since 2001, some for permanent employees (Form I-140) and some for temporary employees (Form I-129), the AAO requested evidence of the status of those petitions and of the petitioner's ability to pay the proffered wage to all of those beneficiaries. The AAO also afforded the petitioner another opportunity to submit specific documentary evidence of the beneficiary's work experience and the pay he received from the petitioner during the years 2006-2010, which had originally been requested in the AAO's previous RFE. The petitioner responded on October 4, 2011, once again submitting some, but not all, of the requested evidence.

The issues before the AAO on appeal are the following:

- What are the minimum educational and experience requirements for the proffered position as specified on the Form ETA 750?
- Did the beneficiary satisfy the educational and experience requirements for the proffered position as of the date the Form ETA 750 was filed with the DOL (the priority date)?
- Has the petitioner established its continuing ability to pay the proffered wage from the priority date up to the present?

Educational and Experience Requirements on the ETA Form 750

The ETA Form 750, as certified by the DOL, specified in boxes 14 and 15 that the minimum requirements to qualify for the proffered position – entitled bilingual psychotherapist – were four years of college, a master's degree in psychology, one year of experience in the "job offered," and fluency in Spanish. In his decisions denying the petition the Director noted that the "4" entered in box 14 as the number of years of college required appeared to have been altered because it was handwritten over whiteout, whereas the rest of the entries in this box, and elsewhere on the form, were all typewritten. Since there was no annotation by the DOL on the Form ETA 750 approving this change, the Director concluded that it was an improper alteration of the form by the petitioner.

Counsel acknowledges that the "4" entered in box 14 was a change to the original draft, but asserts that it was made prior to the filing of the document with the DOL and therefore did not need to be annotated by the DOL. Counsel states that a "5" was originally typed on the Form ETA 750 based on a worksheet submitted by the beneficiary (a copy of which is in the record) indicating that his university studies in Uruguay totaled five years. A correction was made by counsel – whiting out "5" and replacing it with "4" – to reflect the actual years of a standard college education in the

United States. The petitioner derived no advantage from changing the college years requirement, counsel asserts, since the beneficiary's studies comprised five years in any event. So he would have satisfied a five-year requirement just as well as a four-year requirement. Based on the entire record, the AAO is persuaded that the Form ETA 750 was not improperly altered by the petitioner after its filing with the DOL.

Focusing on two of the entries in box 14 – that the minimum requirements for the proffered position were four years of college and one year of experience in the "job offered" – the Director concluded that the job did not require an advanced degree professional with the other minimum requirement specified in box 14 – a master's degree in psychology. In the Director's view, the labor certification requirements of four years of college and one year of experience did not support the petitioner's requested classification of the proffered position as an advanced degree professional because a master's degree requires more than four years of college education or, alternatively, five years of experience in the specialty after the attainment of a bachelor's degree (the "master's degree equivalent" in 8 C.F.R. § 204.5(k)(2)).

The AAO does not agree with the Director's interpretation of the box 14 entries – in particular, that the minimum requirements of four years of college and one year of experience precluded the need for a master's degree. The educational requirements on the Form ETA 750 are aligned in a horizontal progression from grade school, to high school, to college, to degree and major field of study. The petitioner entered "8" for grade school, "4" for high school, and "4" for college, followed by "MA Psychology" for degree required.[2] Each of these entries was separate and distinct, reflecting the progressive steps of educational achievement required to qualify for the proffered position. The final requirement was a master's degree, which demands additional study beyond the four years of college in a standard U.S. bachelor's degree program. Given the constraints of the old Form ETA 750, the labor certification was clear that the minimum educational requirement for the job of bilingual psychotherapist was not just four years of college, as determined by the Director, but a master's degree.

Based on the foregoing analysis of the labor certification, the AAO determines that the minimum educational requirement for the proffered position is a master's degree in psychology. Accordingly, the Director's finding that four years of college is the minimum requirement for the job, rather than a master's degree, is withdrawn. The labor certification is also clear, as the Director correctly noted, that the minimum experience requirement is one year in the "job offered."

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[2] The old Form ETA 750 asked for "college degree required" and made no reference to, or specific space to designate, the requirement of a master's or other advanced degree. This infirmity was rectified on the ETA Form 9089, which replaced the Form ETA 750 on March 28, 2005. The new form dispenses with the question of how many years of "college" are required and refines the focus on the level of education by asking for the specific type(s) of degree(s) required (including associate's, bachelor's, master's, and doctorate).

Did the Beneficiary Satisfy the Educational and Experience Requirements for the Job?

Eligibility for the Classification Sought

As previously noted, the Form ETA 750 in this case is certified by the DOL. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. *See* Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Immigration Act of 1990 Act added section 203(b)(2)(A) to the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference (advanced degree professional) immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons,* 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (INS, or the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[3] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus five years of progressive experience in the specialty). *See* 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. *See* 56 Fed. Reg. at 60900.

For the classification of advanced degree professional, the regulations at 8 C.F.R. § 204.5(k)(3)(i)(A) and (B) require the submission of an "official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree or . . . a United States baccalaureate degree or a foreign equivalent degree [plus evidence of five years of progressive experience in the specialty]." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the

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[3] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

baccalaureate degree was awarded and the area of concentration of study." The AAO cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction). Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991).[4]

The documentation of record shows that the beneficiary attended the Universidad de la Republica (University of the Republic) in Montevideo, Uruguay, where he completed a four-year program in psychology over a five-year period from March 1987 to December 30, 1991, and was awarded a *Titulo de Psicologo* (title of psychologist) on May 14, 1992. In accordance with subsequent legal and regulatory changes the beneficiary was awarded a "modified degree" of *Licenciado en Psicologia* (licentiate degree in psychology) by the Universidad de la Republica on July 3, 2001.

As evidence of the U.S. equivalency of the beneficiary's education in Uruguay, the petitioner has submitted an evaluation by [redacted] stating that the *Licenciado en Psicologia* from the Universidad de la Republica is equivalent to a "combined bachelor's and master's degree in psychology" in the United States. The Globe evaluation, however, is a conclusionary one-page document with no analysis of the beneficiary's coursework and no explanation as to how the U.S. equivalency was determined. Evaluations of a person's foreign education by credentials evaluation organizations are utilized by USCIS as advisory opinions only. Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept it or may give it less weight. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *see also Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). Considering the meager contents of the Globe evaluation, the AAO concludes that it has little or no evidentiary weight.

As another source of information about the U.S. equivalency of the beneficiary's Uruguayan degree, the AAO has consulted the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries." http://www.aacrao.org/about/. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the

[4] *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

evaluation of foreign educational credentials." http://aacraoedge.aacrao.org/register/. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[5] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[6]

According to EDGE, the *Titulo de Psicologo* the beneficiary earned in 1992 was a professional title awarded upon completion of a four- to five-year first degree program, and was comparable to a bachelor's degree in the United States. The same applies to the modified degree the beneficiary was awarded in 2001. According to EDGE, the *Licenciado en Psicologia*, like its forerunner degree, the *Titulo de Psicologo*, is awarded upon completion of a four- to five-year first degree program and is comparable to a bachelor's degree in the United States. The petitioner has submitted no evidence, aside from the insubstantial evaluation from Globe, to refute the equivalency analysis in EDGE.

Based on the entire record, and in view of the information from EDGE, the AAO determines that the petitioner has failed to establish that the degree (or modified degree) awarded to the beneficiary by the Universidad de la Republica in Uruguay is equivalent to a master's degree in psychology from a U.S. university.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to

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[5] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/publications/guide_to_creating_international_publications.pdf.

[6] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

> determining if the alien is qualified for the job for which he seeks sixth preference [visa category] status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on Form ETA 750, Part A. This section of the application for alien labor certification – "Offer of Employment" – describes the terms and conditions of the job offered. It is important that the application be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Regarding the minimum level of education and experience required for the proffered position in this case, Part A of the labor certification reflects the following requirements:

Block 14:

Education: Master's Degree in Psychology

Experience: One year in the "job offered"

Block 15: Must be fluent in Spanish

At the time the Form ETA 750 was filed on May 3, 2002 (the priority date), the beneficiary had the requisite year of experience in the "job offered" and was fluent in Spanish. However, he did not have a master's degree in psychology from a university in the United States or a foreign equivalent degree.

Counsel refers to a letter from the executive director of the Brooklyn Center for Psychotherapy (Brooklyn Center), dated May 30, 2008, which states that the beneficiary "has been a member of this Center's professional staff since June, 2003 [and that] upon the Center's most recent survey conducted the New York State Office of Mental Health, our licensing agency, [the beneficiary's] credentials were accepted." According to counsel, because the beneficiary is licensed to practice psychotherapy in the state of New York, which requires licensees to have a master's degree or the equivalent thereof, the USCIS should accept the beneficiary's *Licenciado en Psicologia* as equivalent to a U.S. master's degree. The AAO notes, however, that a state license to practice psychotherapy does not generally require a master's degree in psychology, but rather a master's degree in social work (MSW). The letter from the Brooklyn Center is totally unclear as to the educational basis for the beneficiary's licensing in New York, and counsel has submitted no evidence in support of his claim that psychotherapists in New York require a master's degree in psychology or a foreign equivalent degree. Even if counsel's claim were correct, USCIS is not bound in the adjudication of immigration-related petitions by any decision the state of New York might make in its professional licensing procedures regarding the type(s) of foreign degree(s) it regards as equivalent to a U.S. master's degree in psychology.

The documentation of record shows that the beneficiary did earn a Master of Social Work degree from New York University (NYU) in May 2005. This degree may have been the basis for the beneficiary's licensing as a psychotherapist in New York. The degree from NYU, however, was in social work, not psychology. The petitioner did not specify on the Form ETA 750 that a degree in a related field of study would be an acceptable alternative. Therefore, the MSW degree would not qualify the beneficiary for the proffered position. Moreover, the NYU degree was not awarded until three years after the labor certification application in this case (Form ETA 750) was filed with the DOL. To prevail in this proceeding the petitioner must demonstrate that the beneficiary had the qualifications stated on its labor certification application (as certified by the DOL and submitted with the instant petition) on the date the application was filed with the DOL (the priority date). *See* 8 C.F.R. § 204.5(k)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). Since the master's degree from NYU was not earned by the beneficiary until after the priority date, it would not qualify the beneficiary for the proffered position under any circumstances.

Thus, the beneficiary does not possess the requisite educational credential – a master's degree in psychology – for the proffered position. As the petitioner did not specify on the Form ETA 750 that a bachelor's degree in the specialty and five or more years of work experience in the "job offered" or a "related occupation" would be acceptable in lieu of a master's degree, the beneficiary's degree from the Universidad de la Republica and work experience in the specialty of psychology[7] cannot be deemed equivalent to a master's degree under 8 C.F.R. § 204.5(k)(2). Accordingly, the beneficiary does not qualify for the proffered position.

Petitioner's Ability to Pay the Proffered Wage

Beyond the decision of the Director, the petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In this case, the labor certification application (ETA Form 750) was accepted by the DOL on May 3, 2002. The form states that the "rate of pay" for the position of bilingual psychotherapist is $21.00/hour for a 35-hour work week (which amounts to $38,220/year).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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[7] The documentation of record indicates that the beneficiary worked as a psychologist and/or psychotherapist for the Ministry of Public Health in Cardona, Uruguay, from June 1993 to December 1999 – a span of six and one-half years.

Based on the documentation of record – which includes copies of the beneficiary's Forms 1099-MISC from the petitioner for the years 2002-2005,[8] showing that the beneficiary's compensation far exceeded the annualized proffered wage in each of those years,[9] and the petitioner's federal income tax returns (Form 990, Return of Organization Exempt from Income Tax) for the years 2005-2009 – the AAO determines that the petitioner would have established its continuing ability to pay the beneficiary the proffered wage from the priority date up to the present in the absence of competing, simultaneously pending immigrant and nonimmigrant visa petitions.

In its second RFE, dated August 10, 2011, the AAO advised the petitioner that a review of USCIS records revealed that it had filed more than 30 other visa petitions for alien workers since 2001, some for permanent employees (Form I-140) and others for temporary employees (Form I-129). The petitioner was advised that it had to demonstrate its ability to pay the proffered wage of each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence and that it must pay each I-129 beneficiary the prevailing wage in accordance with DOL regulations and the labor condition application certified with each H-1B petition. *See* 8 C.F.R. § 204.5(g)(2) and 20 C.F.R. § 655.715, respectively. *See also Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089).

The petitioner was requested to advise the AAO as to the status of each and every I-140 and I-129 petition filed since 2001 – including the offered wage, the priority date of every I-140 beneficiary, if and when the beneficiaries (both I-140s and I-129s) began working for the petitioner, if and when these employees ceased working for the petitioner, and the current immigration status of each beneficiary (*i.e.*, whether or not he or she obtained legal permanent residence in the United States and the date legal residence was established). The petitioner was also advised that, for every beneficiary who was employed during the decade of 2001-2011, their Forms W-2, Wage and Tax Statements, or Forms 1099-MISC should be submitted for every pertinent year.

The petitioner did not respond to this portion of the RFE. Thus, it has not established its continuing ability to pay all I-129 and I-140 beneficiaries it may have employed in the past decade. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying a petition. *See* 8 C.F.R. § 103.2(b)(14). Before this petition could be approved in any future proceedings, the petitioner would have to submit evidence of its ability to pay the proffered wages of all of these beneficiaries.

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[8] The petitioner states that it has employed the beneficiary continuously since March 2001.

[9] Even if the beneficiary's annualized proffered wage were calculated on the basis of a 40-hour week (consistent with the specification on the immigrant visa petition, Form I-140), which would bring the annualized proffered wage up to $43,680/year, the beneficiary's actual compensation during each of the years 2002-2005 was well above that figure.

Summation

The beneficiary does not meet the job requirements on the labor certification. Nor has the beneficiary established its ability to pay the proffered wage to the beneficiary. For each of these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.